

NO. 81210-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

RESPONDENT,

vs.

JASON LEE FRY.,

APPELLANT.

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STATE OF WASHINGTON  
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SUPPLEMENTAL BRIEF OF RESPONDENT

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## ARGUMENT.

The Trial Court and Court of Appeals correctly ruled that Mr. Fry was not a qualifying patient.

RCW 69.51A.040(2) provides for an affirmative defense to criminal charges by “any qualifying patient who is engaged in the medical use of marijuana” . . . “by proof of his or her compliance with the requirements provided by this chapter” . A defendant asserting an affirmative defense, such as the compassionate use defense, bears the burden of offering sufficient evidence to support that defense. State v. Janes, 121 Wash.2d 220, 236-37, 850 P.2d 495 (1993); State v. Tracy 158 Wash.2d 683, 688, 147 P.3d 559 (2006).

The Medical Marijuana defense is limited to: Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, State v. Tracy 158 Wash.2d 683, 688, 147 P.3d 559 (2006) (emphasis in original).

The statutory definition for a “Qualifying patient” includes the requirement that the patient “has been diagnosed by that physician as having a terminal or debilitating medical condition” RCW 69.51A.010(3)(b). RCW 69.51A.010(4) further defines “terminal or debilitating condition”:

“(4) "Terminal or debilitating medical condition" means:

- (a) Cancer, human immunodeficiency virus (HIV), multiple sclerosis, epilepsy or other seizure disorder, or spasticity disorders; or
- (b) Intractable pain, limited for the purpose of this chapter to mean pain unrelieved by standard medical treatments and medications; or
- (c) Glaucoma, either acute or chronic, limited for the purpose of this chapter to

mean increased intraocular pressure unrelieved by standard treatments and medications; or

(d) Crohn's disease with debilitating symptoms unrelieved by standard treatments or medications; or

(e) Hepatitis C with debilitating nausea or intractable pain unrelieved by standard treatments or medications; or

(f) Diseases, including anorexia, which result in nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms, or spasticity, when these symptoms are unrelieved by standard treatments or medications; or

(g) Any other medical condition duly approved by the Washington state medical quality assurance commission in consultation with the board of osteopathic medicine and surgery as directed in this chapter.”

Mr. Fry's condition is not among those listed.

In addition to the statutory medical conditions, the Washington state medical quality assurance board (commission) (MQAC) was granted the authority to approve other medical conditions for which Medical Marijuana could be authorized, RCW 69.51A.010(4)(g).

The issue here is whether Mr. Fry had a terminal or debilitating condition as described in RCW 69.51A.010(4), or subsequently approved by MQAC. On the second page of the authorization form, Dr. Orvald documents the debilitating medical condition as stated by the previous healthcare provider:

"Severe anxiety, rage & depression related to childhood" (CP 21).

The doctor's comments state that Fry 'has found use of medical cannabis allows him to function self control of (anger?)<sup>3</sup> rage & depression' (CP 23).

Mr. Fry's condition does not fall into any of the categories listed in RCW 69.51A.010(4), nor was it subsequently approved by MQAC. In fact, MQAC has specifically denied Medical Marijuana approval for conditions which appear to cover Mr. Fry's symptoms. According to the Department of Health website, <http://www.doh.wa.gov/hsqa/medical-marijuana/docs/QualConditions.pdf>, the Medical Quality Assurance Commission considered and rejected, (Appendix A) Petitions to add to the list of qualifying conditions for which medical marijuana is approved. Those conditions include: Diseases resulting in symptoms of insomnia or post-traumatic stress disorder (Denied by petition to MQAC June 19, 2000); Manic (bipolar disorder) or chronic depression (Denied by petition to MQAC November 22, 2000) and Depression and severe anxiety (denied by Petition November 19, 2004).

The trial court and the Court of Appeals therefore correctly ruled that Mr. Fry is not a "qualifying patient" as a matter of law, and likewise correctly ruled that he may not present the affirmative medical marijuana defense. While one can certainly be sympathetic to Mr. Fry's condition, the determination of which conditions are appropriate for Medical Marijuana use is for the legislature or the Medical Quality Assurance Commission upon Petition, and after hearing.

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<sup>3</sup> Dr. Orvald's handwriting is not completely readable.

Petitioner argues that he was a qualifying patient because, as in State v. Shepard, 110 Wn. App 544, 550 41 P.3d 1235 (2002), the doctor opined that the patient had a "debilitating condition". As the Court of Appeals noted in its opinion, however,

"the Shepard court was not asked to determine whether Mr. Shepard's condition qualified under the Act. In fact, it appears the parties did not dispute that the defendant suffered from a debilitating condition. Shepard is not instructive here."

Court of Appeals Opinion at 7.

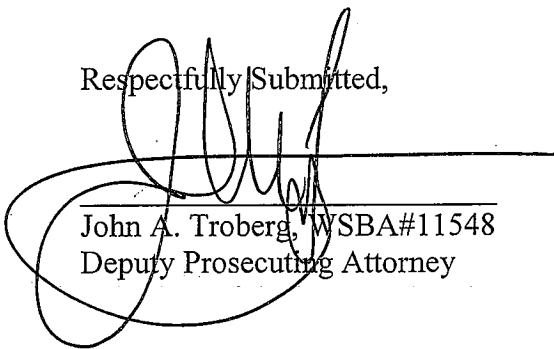
Here, the court was asked to determine whether Mr. Fry's condition qualified under the Act. The debilitating condition was described by the doctor and the trial court and Court of Appeals correctly ruled it was not one for which Medical Marijuana can be authorized. Regardless of the doctor's opinion as to an appropriate method or mode of treatment, an authorization is not valid for a debilitating condition not listed by statute or approved by MQAC, as a matter of law.

CONCLUSION.

This Court should affirm the ruling of the Court of Appeals and the finding of guilt by the trial court.

Dated: 9 September 2005

Respectfully Submitted,



John A. Troberg, WSBA#11548  
Deputy Prosecuting Attorney

# **Medical Marijuana Qualifying Conditions**

**In statute, including those added by ESSB 6032:**

- **Cancer**
- **Human Immunodeficiency Virus (HIV)**
- **Multiple Sclerosis and other spasticity disorders**
- **Epilepsy and other seizure disorders**
- **Acute or chronic glaucoma with increased intraocular pressure unrelieved by standard treatments and medications**
- **Intractable pain unrelieved by standard medical treatments and medications**
- **Hepatitis C with debilitating nausea and/or intractable pain unrelieved by standard treatments or medications<sup>1</sup>**
- **Crohn's Disease with debilitating symptoms unrelieved by standard treatments or medications<sup>2</sup>**
- **Diseases, including anorexia, resulting in nausea, vomiting, wasting, appetite loss, cramping, seizures, muscle spasms and spasticity, unrelieved by standard treatments and medications<sup>3</sup>**

**Conditions for which Medical Marijuana was denied when petitioned to the Medical Quality Assurance Commission:**

- **Diseases resulting in symptoms of insomnia or post-traumatic stress disorder<sup>4</sup>**
- **Manic (bipolar disorder) or chronic depression<sup>5</sup>**
- **Depression and severe anxiety<sup>6</sup>**

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<sup>1</sup> Authorized by petition to the Medical Quality Assurance Commission (MQAC) on January 28, 2000.

<sup>2</sup> Authorized by petition to MQAC on November 5, 1999.

<sup>3</sup> Authorized by petition to MQAC on June 19, 2000.

<sup>4</sup> Denied by petition to MQAC on June 19, 2000.

<sup>5</sup> Denied by petition to MQAC on November 22, 2000.

<sup>6</sup> Denied by petition to MQAC on November 19, 2004.



CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I mailed a true and correct copy of the foregoing Supplemental Brief of Respondent to the Supreme Court of the State of Washington, P.O. Box 40929, Olympia, WA 98504-0929; to William D. Edelblute, Attorney at Law, 300 N. Argonne Road, Suite 203, Spokane Valley, WA 99212-2839, and to Jason Fry, Appellant, 850-I Finley Gulch, Colville, WA 99114, on date September 9, 2008.

Michele Lembcke

Michele Lembcke, Legal Assistant to  
John A. Troberg